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The Appeals Process

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PART TWO
The Appeals Process

THOMAS M. REAVLEY
THE PROBLEM IS US

Thomas M. Reavley is a Senior Judge on the United States Court of Appeals for the Fifth Circuit. Justice Reavley has served as Secretary of State for the State of Texas, District Judge, 167th District, and as a Justice on the Supreme Court of Texas. In addition, Justice Reavley has taught classes as an adjunct professor at the University of Texas Law School and lectures at Baylor University Law School.

My high school debate coach insisted that we memorize our debate speeches, not only the opening affirmative speech but also the negative speeches and even rebuttals. I suggested that we might do better by responding to what had been said by the other side instead of repeating a speech set in advance, but he told us that the pros and cons were pretty much the same, and that he was doing it the way it was supposed to be done and the way he had always done it.

That was my earliest recognition of error covered by: "the way it is supposed to be done." Or "this is the way we do it" or "have always done it." Well, sometimes we should change. Sometimes it is the wrong way. Sometimes our way of doing things ceases to serve its purposes. But too often we just go on repeating our errors despite the grief they bring.

That is what is happening in the courts of appeals.

Lawyers think that they are supposed to write long "scholarly" briefs, complaining about every conceivable error of the trial judge, immersed in lots of law and citations of authority.

Judges think that we are supposed to write—for publication—"scholarly" opinions relating all of the background of the cases and discussing all the arguments of the lawyers, buttressed by lots of law and citations of authority.

Law schools have been teaching beginners to find as many legal issues as possible in any controversy. For each and every issue they are taught that excellence requires an exhaustive exposition of every case of similar facts in the books. Lawyers go all through their careers thinking that this is what legal advocacy is supposed to be.

It is a great sport. Lawyers display their advocacy skills and inflate their fees, and may even hide the real issues of the controversies so as to prevail when not entitled to do so. More and more judges and law clerks are needed. And the academics have loads to play with.

But our gain is at a cost to the clients and to the public purse. I respectfully suggest that the time has come to jettison most of that baggage in the interest of clients and the administration of justice.

What lawyers, judges, and academics think is supposed to be the way to do their business can no longer be afforded.

We hear a great cry raised across the country about the crisis of the courts, oppressive dockets, and the loss of justice. I respectfully suggest that there is indeed a crisis in doing things the same way they have been done. But that is what is in peril, not justice.

We simply need to change.

Lawyers must learn to focus precisely on the dispositive issues, the controlling evidence and legal precedent. All of the frivolous argument and obfuscation must be banished. If the lawyer cannot state her position without pomp and cookery, she cannot expect to prevail.

Court of appeal judges will not comb the record on their own to determine if they agree with the trial court's judgment. They will take the facts as found or assumed and lay the precise objection of the attorney alongside. Then the judge will write a succinct statement of what is decided. Only rarely is publication justified. If not published, only a few pages are needed: "The judgment is affirmed—or reversed—or modified, for the following reasons—one, two, three."

The decision should be a public record. It can be on-line for computer retrieval. But it should not be added to the West Reporter mountain or be a candidate for string citations. It should demonstrate the appellate judge's consideration of the arguments advanced by the parties. Sometimes an incomprehensible petition can best be disposed of by a word, and often the appellate panel need only adopt the reasons stated by the trial court; but usually the reasons for the decision should be announced.

There are those who lament the passing of the long, scholarly opinion fitting the "Learned Hand model." There are, of course, cases that come to the courts of appeal calling for full-dress traditional treatment. But these are very rare, and they would be more likely to receive their deserved treatment, without unacceptable delay, if the judges were not spending so much time doing what is thought to be required by tradition but what is actually habit and what is still said to be the way it is supposed to be.

I have been a federal court of appeals judge for about eighteen years. I have been a senior judge for almost seven years, during which time I have worked with almost all of the other circuits. And I can tell you that

we are wasting an enormous amount of time and money by following our old habits.

I have reviewed the last four sessions of court in which I participated during 1996. To prepare for those oral arguments I read over 7000 pages of briefs in the eighty-eight appeals. The appellants had conceivable cause for complaint in only forty-nine of the appeals, but there was no arguable merit in thirty-nine of the appeals. I received no help from any of the oral arguments. They played no part in my decision. I concede that thirteen oral arguments were interesting and may have contributed to the process of decision by the other two judges. Only thirteen. That justified no more than two days of hearings, instead of four weeks. And yet three judges, giving a full month each, cost the government over \$50,000 in travel expenses.

The fact of the matter is that almost all oral arguments benefit the lawyers, but not the judges. This has been true in American courts for a long time. Lawyers have a vested interest in the oral argument, giving them more fees and praise of performance. Old habits die hard—especially when they are profitable. Most judges and lawyers may disagree with me on this, but it is my view of reality.

I recognize some merit in the view that public argument and exchange between advocate and judge advances respect for the courts and regard for the legitimacy of the judicial process on the part of the parties, and maybe the public. Nevertheless, it is time to recognize the emperor's nakedness. There are habits and luxuries that we can no longer afford.

Here is what court of appeal judges must do:

1. Discriminate, screen, prioritize between appeals. If an appeal deserves short shrift, give it that and no more. One judge can screen out appeals with no arguable merit. After a one-paragraph order, a second judge can take another look in response to a petition for rehearing.
2. Recognize that the facts have been determined by the trial court and that there is another higher court charged with law-making authority. Usually, the intermediate court need only consider at the outset whether the appellant has significant error to complain about.
3. Recognize that the intermediate court is justified in writing a thorough discussion of legal issues in relatively few cases. And when this is justified, it will be done much better, much sooner, and perhaps by the judge himself—if the other cases have been given no more than their due.

4. Think about the consequences of delay and indecision. It would help the litigants, the other judges on the panels, and the writing judge as well, if judges would not sit on their decisions for months and even years. This is inexcusable. If I dislike having to restudy a case long after submission, when my colleague finally gets around to writing, just think of the feelings of the parties.
5. Finally, add no more to the rules of law than is necessary. The law should enable and not burden society. In these quiet, protected chambers, we enjoy the opportunity to extrapolate endless rules and exceptions for the lawyers and lesser souls to obey. Too many of us cannot resist the opportunity. Just look at our contribution to guidelines sentencing or read *First United Financial Corporation v. USF&G*¹ or just thumb through the *Federal Reporter*.

It is easy enough to play the numbers game—and to be distressed by it. When Professor Baker wrote his book on the crisis in the courts of appeal, he wrote that only the Ninth Circuit had more than 4000 new appeals a year. I corrected him by pointing out that the Fifth Circuit that year (1993) had 6696 new appeals. This year we will have 8000. And they are building a new federal prison complex in East Texas that will house 26,000 prisoners. These are our best customers. Between thirty-five and forty percent of the cases filed in federal courts come from prisoners. Congress should provide that a certificate of appeal is required for an appeal of any of these cases, as Congress has provided for habeas appeal. But the court need not wait on Congress. We just need to get out of our ruts.

Here is my plan for the Fifth Circuit. Each judge would spend six weeks out of the year in New Orleans—until we get teleconferencing. But half of those weeks would be on Conference Calendar duty. The staff attorneys would bring to a Conference Calendar panel the records of all the new cases on hand, divided among the three judges, with written proposals for disposition. Record or legal questions would be turned over to elbow clerks for prompt resolution. Problem cases would be calendared for oral argument. The Conference Calendar would complete its work that week. Cases orally argued would be decided by opinion before the writing judge served on another argument panel.

Lawyers must change too, I repeat. Before you file your brief, eliminate the lard and the fussing and the obfuscation and the frivolous. Focus your writing on the controlling law and evidence. Either state your position so the judge cannot miss it, or concede the judgment.

I will give you an example of what I am talking about. There was a wrongful death suit against the United States under the Federal Tort

1. 96 F.3d 135 (5th Cir. 1996).

Claims Act. Doctors of the Veterans Administration misdiagnosed the deceased, told him he had a hernia, to lose weight to have it operated. Actually, he had a benign tumor in his colon that eventually caused the colon or appendix to burst. He barely survived that problem, but blood transfusions he received contained the HIV virus that led to AIDS and then to his death. Negligent misdiagnosis was conceded. At the trial before the judge the only issue was whether the negligence and delay proximately caused the blood transfusion.

The trial judge dictated a twenty-three page Findings of Fact and Conclusions of Law. It was not well organized and was confusing at some points. There was some disagreement among the doctors about the site of the perforation, but the judge found that it was the appendix that perforated and not the colon. The plaintiffs received a judgment of some \$700,000.

The Government appealed and filed a brief of twenty-eight pages in which the writer hid the ball. He described the expert testimony for the plaintiff as attributing the perforation to the colon and not the appendix, and argued—incorrectly—that no expert testified to a probable causal connection between the obstruction and the perforation of the appendix.

The plaintiff's lawyer filed a thirty-two page brief that failed to uncover the ball. The first five pages were devoted to the poor treatment of the deceased by the VA doctors, a fact not at issue. Next came an irrelevant discussion of the conflict on the site of the perforation. Then, of course, came lots of law. Finally, in the middle of the brief, the lawyer wrote a fuzzy summary of the medical testimony that the obstruction blocked the appendix, causing it to become infected and to burst, causing the peritonitis, requiring the transfusion that caused the death. His summary was not nearly so simple as I have just stated it.

A very simple case. Clearly a judgment supported by the evidence. But you might not know it from reading the briefs. And the court of appeals judge who got the case on the summary calendar wrote an opinion reversing the judgment. Fortunately, the next judge on the summary panel chose to let the case be argued. I was on the oral argument panel. The argument shed no more light than the briefs did. But I read the record and, seeing ample support for the findings, affirmed. It was an excellent example of what ails us, and I assure you that this is not an unusual story.

In the best of all worlds appellate judges would read the complete trial record in every case they decide. I was on a court of last resort for nine years, and I did that in every case for which I wrote an opinion. But this

is impossible for the judges of the courts of appeal with their present dockets. Lawyers must understand what this means, stop writing law school exam answers and rambling argument, and make the point.

Goethe wrote: "New occasions teach new duties." The shibboleths of yore and the assumptions, blithely assumed because they have been so long supposed, may be false or useless today.

Our profession and system for the delivery of justice give us reasons to be proud and grateful. You ought to go to Beijing or Moscow and take a look at the problems countries face when they lack good lawyers and legal processes. We are blessed. But we also have many serious problems that need fixing. Both criminal and civil justice systems suffer from the everlasting fine tuning by our champions of esoterica, the rulemakers who imagine that they are working toward perfection in the grand edifice of the law but who are actually undoing social order because the people cannot cope with so grand an edifice.

This profession needs to do a lot of rethinking, and the turn of the millennium is a good time to do it.

THOMAS E. BAKER

Thomas E. Baker is the Alvin R. Allison Professor at Texas Tech Law School where he teaches Constitutional Law and Federal Courts. Professor Baker authored a book entitled Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals, which reviews the history of the courts, describes the present situation in the courts, and offers proposals for change.

Professor Baker: Following Judge Reavley is almost impossible. He's a federal judge, of course, and he has the credibility of a methodist bishop. In fact, when the invitation came to my house for this conference, I showed it to my wife, and she was all excited and enthusiastic about the trip. I said, "Why, because of the importance of the program and subject matter?"

"No, no."

"Because of the prominence of Pepperdine University?"

"No."

"A Malibu trip in winter?"

"No."

"Well, why? Why are you so excited about this program?"

And she looked and she pointed to his name and she said, "Because Judge Reavley is going to be there. I like him better than I like you."

I have tried to impress the judge before and not succeeded. I wrote a 450-page book and he was kind enough to write a review of it. He dismissed my book with this one sentence that I'd like to read to you: He said, "If we are facing failure in our assignment, corrections by Congress and the judges are at hand and should silence the alarm bells."¹ And then he wrote a very kind review and went on to discuss my book.

It's also difficult to follow him orally because he just explained that whatever I can say to him orally will not change his mind.

But I'll try. I'll try.

I was trying to figure out a way to make this interesting to a group of law students that I knew were going to be in the audience as well as distinguished lawyers and others. I could not figure out a way to make judicial administration interesting. I thought maybe I could try to make it funny, but I knew that would be impossible. So I resorted to technology and did some research on the Internet. I cranked up my Netscape browser and by some curious surge or something (I'm not sure I understand the technology), the screen went blank. Netscape 2020 came up on the screen. Never has this happened before or since. I was able to download a copy of the Chief Justice's Year-End Report for the year 2020.

I don't have time to read the entire Year-End Report and that would be deadly dull, but I'd like to highlight just a few of the interesting developments that the Chief Justice of the United States in the year 2020 describes in this Year-End Report looking back on the future that we are looking forward to.

It begins with a startling announcement that the Chief Justice is retiring as Chief Justice at the end of the October term 2020. By the way, if there are any members of the media present, note on the cover that this is embargoed and you cannot report on this until Thursday, January 1, 2021.

(Laughter.)

Judge Reavley: Everything I said is embargoed.

(Laughter.)

Professor Baker: He's even funnier than me.

So the Chief Justice announces this retirement will be effective at the end of the October term 2020 and goes on to congratulate Justice

1. Thomas M. Reavley, Book Review, 26 TEX. TECH. L. REV. 271, 271 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)).

Antonin Scalia on his eighty-sixth birthday and says, "Without fear of contradiction that the 'Energizer Dissenter,' as he is affectionately known, will go on and on, beating his drum for many terms to come."

The Chief Justice's Report then touches on a new procedural development that I thought was very interesting. It's called the Writ of Reinhardt. Judge Reavley just served on a panel with Stephen Reinhardt.

Apparently, in the future, the Supreme Court will designate a list of circuit judges by name so that every decision or opinion written by the judge on that list will be automatically vacated and remanded.

But to be serious for a moment, the Year-End Report talks about the first two decades of the twenty-first century. And here, I think, is a glimpse ahead to what the federal courts in our nation are facing in terms of demographics, civil caseload growth, criminal caseload growth, and federalization.

The Chief Justice first says that in the area of demographics, the population has increased by thirty million people, and because the basic workload of the federal courts is a function of population, the caseload in the judicial workload has grown apace. Further, because of the aging of the "Baby-boomer" generation, more cases and more issues involving the elderly have been pressed on the courts.

There is a vague reference to the Social Security Crisis of 2011. I'm not sure what that is about.

On the subject of civil docket growth, the Report says that, according to differences in birthrates and immigration among racial groups, proportional increases in the percentages of non-white ethnic and racial groups also affect the future of the courts. Our future, the Chief Justice's past. The transition from a smokestack economy to a silicon chip society has had a consequent increase in litigation.

The Report goes on to describe the factors that have grown the civil caseload: Extensions of civil rights and antidiscrimination policies; expansion of mass tort litigation; deconstructive tendencies to extend malpractice theories to areas of education, religion, and government; and finally, general litigiousness that increases between the years 2000 and 2020.

The criminal docket also grows according to the Year-End Report. It increases in the first two decades of the next century because of a legislative tendency towards criminalization and a proclivity of prosecutors in the executive branch to prosecute more.

According to the Year-End Report, the forty-year long "War on Drugs" has also contributed to the oppressive dockets in the District Courts.

But the most important development for federal court workload in the near future is what is called in the Year-End Report "federalization." Federalization of the law. More and more areas of law traditionally con-

sidered state law have been federalized, and that workload has been added to the federal courts. There's reference to a national health care program and a Federal Products Liability Act in terms of adding some 80,000 cases a year to the District Courts' dockets. The Chief Justice expresses concerns in the following words: "The Third Branch always has and always will depend on 'the kindness of strangers,'² in the legislative branch. . . . But Congress must not practice deficit jurisdiction. The number of judges and the resources of the judicial branch must remain equal to the demands on the court system." Then there's a reference under a heading of Judicial Independence apparently to some sort of impeachment proceeding against Circuit Judge Dennis Rodman of the Court of Appeals for Chicago.

The United States Court of Appeals, though, is the focus of an entire part of this Year-End Report, and the Chief Justice's Report lists some sixteen different studies, almost all having to do with the Courts of Appeals and recommending some sort of change or reform of those courts. In fact, the Report refers to a new commission, still one more study, the 2020 Commission—not to be confused with the television show—the 2020 Commission on Federal Court Structure, popularly named the Baker Commission.

The Baker Commission delivered in the year of this Report a 200-page final report entitled *Courts to Congress: Just do it!* The Chief Justice echoes that plaintive plea to say something has to be done about this "mega-crisis"—to use the phrasing of the Report—mega-crisis of caseload and the creation of more and more judges to meet caseload. According to this document, by the year 2020, there are 2000 circuit judges and 400,000 appeals.

But more importantly, the Chief Justice expresses concern with the rate of appeal, the ratio between the number of terminations in the District Court, and the number of cases that are present on appeal. Between 1950 and the year 2000 that ratio went from 1:40 to 1:8, and extrapolating to the middle of the next century, to the year 2050, it could suggest that one out of every two—fifty percent of everything the District Courts do—ends up on a Court of Appeals docket.

But there are certainly good things to talk about in the future according to the Chief Justice's Report, and those are procedural innovations.

2. "Whoever you are—I have always depended on the kindness of strangers." TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* act 3, sc. 11 (1947) (quoting character of Blanche DuBois).

Innovations like the Summary Calendar which is a non-argument calendar. Those appeals screened onto that calendar are decided without oral argument. And, in fact, that started back in 1979. By the 1990s, about half the cases are decided without oral argument. In the future that is reduced to one in ten. And the Chief Justice proposes to abolish oral argument altogether, which I suppose we would have to call the Reavley Proposal after this morning.

Decisions without opinions are another innovation of the old Fifth Circuit back in the 1970s. Again by the year 2020, opinions are written in no more than one-quarter of the appeals brought nationwide, and the proposal of the Chief Justice is to abolish opinions altogether. One point in favor of the Chief Justice's position to abolishing written opinions in federal appeals is that it would eliminate the problem of inner-circuit conflicts, because we won't know if there were any conflicts. The Chief Justice's Report emphasizes that it is time to free ourselves from this formalistic ritual that dates back to before there were computers. The written opinion should be done away with.

There's also a section in the report on staff attorneys and law clerks. Fortunately, circuit judges have held that to a 5:1 ratio, four elbow clerks and one staff attorney at the headquarters—although apparently in the future some Courts of Appeals judges are experimenting with the position of a law clerk's law clerk.

Professor Richman: Externs.

Professor Baker: In those courts, the law clerks have been renamed "sub-judges" and the law clerks to the sub-judges are called "para-judicials."

There's lots of technology reported in the future. As you might expect, home pages in the Internet, virtual oral arguments, e-mail linkages for briefing, and the rest.

One interesting future development is a prototype software program nicknamed "Judge Dread," in which lawyers from both sides will respond to a series and sets of questions, each subsequent set of questions being generated by the previous set until the computer program develops an affirmed or reversed recommendation to the judge. But the judging will always be done by the humans.

(Laughter.)

Judge Reavley: Not the clerks.

(Laughter.)

Professor Baker: Not the clerks.

And so these are the new traditions that have replaced old traditions. The Chief Justice singles out especially two innovations and recommends them to other Courts of Appeals that I want to highlight from this Year-End Report.

The first is from the United States Court of Appeals for Las Vegas where the judges have developed the "Coin-Toss Calendar." A case is screened onto this calendar if it satisfies certain criteria. If the appeal presents issues that are unimportant or uninteresting to the judges and it appears that determining the correct outcome will just take too much time, considering what is at stake for the party-litigants, maybe some prisoner, then the case is scheduled for an appellate appearance before an appellate magistrate who is equipped with a coin specially cast for the occasion with the seal of the court on each side. One side says "Affirmed," and the other side says "Reversed." And justice is done.

Professor Richman: Both sides could say "Affirmed."

(Laughter.)

Professor Baker: There's no complaint about delegation to law clerks. We save the judges time, and it formalizes and legitimizes a practice that court-observers have actually attributed to judges.

The second interesting development, a pilot program, comes from the United States Court of Appeals for Atlantic City which has developed an ingenious procedure they refer to as a "Scratch-an-Appeal." These are used in social security cases, prisoner civil rights cases, habeas corpus cases, and other sorts of unimportant cases. A statistical analysis revealed a low percentage of reversals anyway in those categories that did not correlate with any fact pattern or principle of law. They resembled Jungian black-box decisions anyway.

So the clerk of the court developed an agreement with the same company that provides "scratch-off" game cards for the New Jersey state lottery. When an appeal is presented—and these are very tastefully done now—they have the figure of Justice with the scales of justice on the front and the legend bears "U.S. Court of Appeals for Atlantic City Scratch-an-Appeal." There would be full color printing and no tampering or counterfeiting problems. In these designated categories of appeals, the clerk takes the next card from a secure dispenser, puts a docket number on it and mails it to the appellant with instructions to use a key or a coin to scratch away the scales of justice and reveal the outcome in that appeal, "Affirmed" or "Reversed." In fact, the Court of Appeals for Atlantic City is already thinking of expanding this program to develop a separate card for all cases with pro se appellants, whose litigation proclivities, the Chief Justice says, somewhat mirror a compulsive gambler.

The key to the program, according to the Chief Justice, is that the reversal rate is set at ten percent, which is a better payout than most

state lotteries and a higher rate of reversal than courts usually give in these cases.

But, again, the Chief Justice emphasizes that even with all these savings of judge time and judicial resources, the press of the cases continues and the Report describes a kind of breakthrough in the supply and demand of federal appellate judgeships.

The Circuit Judgeship Parity Act of the year 2000. You may know from your federal court history that omnibus judgeship bills are traditionally the captives of divided government. When the White House and the Congress are in different parties, it's rare to have judgeships created. But there was this judicial miracle, the Chief Justice calls it, in the year 2000 that transferred authority to create circuit judgeships to the Judicial Conference under a docket-based formula and to maintain a parity between the filings and the judges on the courts. And therefore judicial gridlock was overcome while maintaining generalized courts. Although, of course, the number of judges has doubled roughly every ten years to the present complement of 2000 in the year 2020.

The other consequence for the future, according to the Year-End Report, is that the circuits, the geographical circuits with which we're very familiar, have been obliterated. The nineteenth century geographical organization is gone by the year 2020. First you will remember the 1981 decision of the old Fifth Circuit and that proved to be a harbinger of things to come. The old Ninth Circuit, according to the Report, was divided immediately to create the Twelfth Circuit. But then when no court wanted to become the Thirteenth Circuit out of judicial triskaidekaphobia, Congress renamed all of the different courts of appeals after their headquarters city. So the U.S. Court of Appeals for the Fifth Circuit was renamed the U.S. Court of Appeals for New Orleans. And so this process continued according to the Report until reaching the stable configuration of 154 separate circuit courts of appeals and 2000 circuit judges.

But there have been important criteria in dividing circuits identified by the Baker Commission. First, a circuit should be composed of at least three zip codes. Second, no circuit should be created that will not require at least nine judges. Third, a circuit should contain neighborhoods with a diversity of population, legal, business, and socioeconomic interests. Fourth, realignment should not depend on preexisting alignments. Fifth, the circuits should be as contiguous as is possible. But again, dividing circuits did not affect the workload because it does not change the ratio of judges and appeals or the ratio of judge work to judges.

The Report ends to talk and to praise the evolved federal Courts of Appeals, the U.S. Courts of Appeals in the year 2020, with the rhetorical question, "What does it matter if it takes 2000 judges today to decide 400,000 appeals?" Here I quote: "We have arrived at the modern appellate wisdom that it is more important that an appeal be decided than that it

be decided rightly." And so appellate procedures are a means towards an end. Nothing more, nothing less. What is essential is that the appeal-as-of-right has been preserved in the face of that long-term docket growth.

The Chief Justice closes the Report with a personal postscript describing the fact that in the year 2020, as the nation begins the third decade of that new century, that it would be appropriate to build a foundation of the bridge to the twenty-second century. And here the Chief says: "That was one of President Clinton's favorite metaphors back when he appointed me Chief Justice. I want to conclude by expressing my heartfelt thanks to him for providing me this opportunity for judicial service under the Constitution, made possible in no small part by his full and unconditional pardon. He has been a wonderful helpmate and life's partner." The Report is signed, "Hillary Rodham Clinton," Chief Justice of the United States Supreme Court.

PROFESSOR WILLIAM M. RICHMAN

RATIONING JUDGESHIP HAS LOST ITS APPEAL

William M. Richman is a professor of law at the University of Toledo College of Law. Professor Richman currently teaches, among other subjects, Judicial Administration and Jurisprudence and has recently co-authored an article in the Cornell Law Review titled Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition.

I. INTRODUCTION¹

The federal circuit courts have changed radically in the last twenty-five years in response to an overwhelming increase in caseload. For most of

1. For a more in-depth discussion, see William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

their one-hundred year history, the judges heard oral arguments and wrote fully reasoned, published opinions in nearly all cases. Today, those time-honored procedures are sadly truncated. Now, fewer than half the circuit courts hear oral argument in at least half of the cases they decide. Traditionally the norm, a fully reasoned precedential opinion today accounts for less than a third of all case terminations. Further, the judge now operates not as an isolated artisan, but rather as the manager of a team of clerks and staff attorneys whose role is to conserve judicial effort by screening cases and participating significantly in the opinion writing and decision-making processes. Law clerks have trebled in the last thirty years; and central staff, unknown thirty years ago, now outnumber judges in most circuits.

Not only is judge time rationed, but the key decisions allocating the judges' efforts are not even made by the judges. Clerks and central staff screen the appeals to determine how much judge time to allocate to each case and recommend whether oral argument should be granted and whether a full opinion (or, indeed, any opinion) should be written. Thus, an effective right to appeal error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges. In short, despite their statutory and historical role as courts of appeals, the circuit courts have become certiorari courts.

These developments have had other unfortunate consequences as well. First, the overall quality of the work of the circuit courts has declined markedly. The reduction is most obvious in the opinions; more than half are unpublished, and a substantial portion fail the most minimal standards. Somewhat less obvious are the effects of curtailing argument and the proliferation of para-judicial personnel. To see this effect, it is important to remember that the courts' work product is not simply correct appellate decisions, but also the appearance of deliberative justice meted out in fair proportion to all litigants. Reductions in oral argument damage this product by depriving litigants of the assurance that the judges have paid some personal attention to their cases. The proliferation of appellate bureaucracy only exacerbates the problem, leading litigants to suspect that the staff, not the judges, have made the decision.

Second, and perhaps more important, the transformation has created different tracks of justice for different cases and different litigants, a practice that threatens the judges' ability to fulfill their oath to "administer justice without respect to persons, and do equal right to the poor and to the rich. . . ." ² In an "important" case, perhaps in a major securities matter, the judges play a very active role: they listen to oral argument, work hard preparing opinions that are circulated among and read

2. 28 U.S.C. § 453 (1994).

carefully by their colleagues, and ultimately have the final opinion published to serve as a precedent.

In contrast, in a "routine" case (an appeal of a denial of social security benefits, for example), central staff may read the briefs, recommend against oral argument, and prepare a draft opinion. The judge's own clerks then scan the reports from central staff to see if they should be followed. In these cases, actual judge time probably consists of limited review of the staff recommendations. The draft opinion is not published, and sometimes no opinion (other than a brief affirmation) is issued at all.

Exacerbating the problem of two-track justice is its unequal administration. The burdens of the change fall disproportionately on the poorest and least powerful federal litigants because theirs are the "trivial" cases: social security litigation, civil rights cases, pro se appeals, and prisoner petitions. The standard explanation for different tracks of justice is that some cases are more "important" than others because the economic stakes are higher or the legal problems more complex or more pervasive, but that explanation misses the point. The basic guarantee of justice to all in equal measure suffers under any regime that allocates justice differently according to the wealth and sophistication of the litigants.

These developments are a direct consequence of an increase in case-load that has far outstripped the increase in the number of judges. Yet the transformation was not inevitable. The Judicial Establishment has steadfastly resisted the one obvious solution: to ask Congress for a radical increase in the number of judges. The Judicial Establishment has advanced various reasons for such resistance, despite well-known data and arguments to the contrary. Other reasons for the resistance are the judges' desires to preserve the elite status of a small judiciary and to replicate the comfortable role they enjoyed at the apex of a career in practice or at the academy.

The transformation of the federal appellate courts into certiorari courts has not taken place by design but has been the by-product of the effort to maintain a small, elite federal judiciary. The size of the tool has dictated the size of the job, rather than the other way around. Moreover, the transformation has gone largely unnoticed and virtually without debate in the larger legal community. This symposium panel is an important step in launching that debate.

B. The Arguments

1. Quality Candidates

Some opponents of expansion argue that increasing the number of judgeships would vastly reduce the quality of the bench. In its purest form (that there are not enough good candidates to fill the additional judgeships) the argument is hard to take seriously. Increasing circuit judgeships by 100 would result in a 3000-to-one ratio of lawyers to circuit judgeships. Surely of every 3000 lawyers in this country, there is one qualified, willing, and able to fill a circuit judgeship. Narrowing the field considerably, there are over 600 district judges, about 800 state appellate judges, over 5000 law professors, and countless senior partners, prosecutors, public defenders, and state and federal administrative lawyers; surely that group could produce 100 distinguished candidates for the circuit courts.

A variation of the argument asserts that increases in judgeships will reduce the prestige of the position and thus diminish the pool of distinguished candidates. No empirical evidence supports this bald assertion, however. Indeed, the limited evidence available suggests the opposite. Circuit judgeships have not become less sought after as their number has tripled since 1950, nor is there a dearth of fine applicants for the 649 district court judgeships.

Another variation asserts that an increase in judgeships will reduce the scrutiny of each appointment, permitting the political process to forward and confirm mediocre candidates. With respect to congressional scrutiny, the argument comes too late. Judges are confirmed in groups and hearings are pro forma. There is no empirical support for the argument that increases in judgeships will reduce other forms of scrutiny; and the limited evidence that exists suggests the opposite. There has been no noticeable reduction in scrutiny or quality as the circuit bench has tripled in the last fifty years, nor do we know of variations in scrutiny and quality between the First Circuit with six judges and the Ninth with twenty-eight. Further, if increases would dilute quality and scrutiny, there is no indication of the relevant numbers or proportions. For all we know, a 1000% increase in judgeships might have a substantial impact on scrutiny and quality, while an increase of 100% (the largest suggested so far) might have none. These questions have never been investigated, nor even seriously posed.

The quality-of-the-bench argument suffers from an even more serious flaw. It focuses on the quality of the active circuit judges—not on the quality of the appellate justice dispensed. The two are different because circuit judges are responsible for only a part of the work of the circuit courts, the remainder falling to visiting judges, law clerks, and central staff attorneys. A substantial increase in the number of judgeships would

reduce improper delegation and increase the odds that every case on the docket would receive the personal attention of the judges. Thus, even if expansion reduced the quality of the average circuit judge, it would still increase the overall quality of appellate justice.

2. Expansion is Too Expensive

Opponents of additional appellate capacity rely on the cost of new judgeships, citing \$800,000 as the cost of each new position. The 100 new judgeships needed thus entail an annual expenditure of about \$80 million. But large numbers can be understood only through comparisons. The federal government spends only two-tenths of one percent of the federal budget on the entire federal judiciary—\$2.6 billion out of the total \$1.4 trillion.³ The \$80 million required for 100 new judgeships in turn amounts to less than three percent of the \$2.6 billion judiciary budget, and thus about one two-hundredth of one percent of the federal budget.

Comparisons to other federal expenditures are also revealing. The franking privilege for members of Congress costs about \$60 million per year⁴; the National Gallery of Art, about \$50 million⁵; price support payments to wool and mohair producers, about \$180 million⁶; and more than forty universities receive over \$70 million each in Federal Research and Development Funds.⁷ These comparisons make it quite clear that adding one hundred new circuit judgeships would not be a major expense either viewed as a fraction of the total budget, or by comparison with other uses of federal dollars.

The argument suffers from a more crucial flaw. Even if the extra capacity were too expensive on some platonic scale, that is a reason for *Congress* to refuse to create the judgeships—it is not a reason for the judiciary to refuse to ask for them. Put somewhat differently, even though Congress may refuse to fund a weapons system, the generals are usually willing to ask for it. In the congressional funding game, each budgetary supplicant emphasizes the paramount importance of its needs to the national welfare, jockeying with the others to increase its slice of the pie. It is then the job of Congress to choose among the competing

3. BUDGET OF THE UNITED STATE GOVERNMENT, ANALYTICAL PERSPECTIVES 104-06 tbl. 7-2 (1995).

4. *Id.* at 14-15.

5. BUDGET OF THE UNITED STATES GOVERNMENT, APPENDIX 967 (1995).

6. *Id.* at 154.

7. STATISTICAL ABSTRACT OF THE UNITED STATES 611 tbl. 973 (1994).

claims. The budget process relies on the judiciary to inform Congress of the resources needed to do the job—not to engage in self-censorship by asking for only ten percent of the needed positions.

3. Too Much Precedent?

Opponents of increased appellate capacity have argued that expansion will lead to instability in the law. According to this argument, if Congress adds judgeships to existing circuits, the circuit courts will decide more cases, and the law of the circuit will become muddled, which in turn, will promote higher rates of appeal as losing litigants find it increasingly worthwhile to “take their chances.” Alternatively, Congress could add more circuits, but anti-expansionists contend that doing so would increase inter-circuit conflicts, which already are too numerous for the Supreme Court to resolve.

a. *No empirical evidence*

The first of many problems with the instability-of-the-law argument is that its crucial premises lack any empirical support. There simply is no evidence that increasing the number of judgeships within a circuit reduces the stability of circuit law or increases the rate of appeal. Nor is there any evidence that increasing the number of circuits will create a serious problem of unresolved inter-circuit conflicts.

A Federal Judicial Center study reported that eighty percent of responding circuit judges and sixty-eight percent of responding district judges believed that lack of clear circuit precedent was a small or non-existent problem.⁸ Further, in each group the percentage of judges expressing a concern did not correlate with circuit size.

Another useful study, commissioned by the Ninth Circuit and conducted by Professor Arthur Hellman, targeted inconsistency of circuit precedent and unpredictability of decisions.⁹ Hellman examined a sample of the published opinions of the Ninth Circuit and found little evidence of intra-circuit conflict.¹⁰ Most examples of inconsistency that he did find dealt with issues governed by fact-specific, multi-factor, or indeterminate legal standards such as probable cause for an arrest, personal jurisdiction over a non-resident, or “rule of reason” cases.¹¹ Professor Hellman concluded that these issues were likely to cause unpredictability regard-

8. JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 93 (1993).

9. Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991).

10. *Id.* at 920.

11. *Id.* at 972.

less of the number of applicable precedents and, therefore, regardless of circuit size.¹²

Hellman also examined separate dissenting and concurring opinions on 172 issues in the sample.¹³ His analysis led him to conclude that the primary cause of unpredictable outcomes in the Ninth Circuit was not "a plethora of circuit precedents that point in different directions," but rather the "absence of a circuit precedent that is closely on point or, less commonly, a fact-specific rule . . . that by its nature requires case-by-case evaluation."¹⁴ These conditions, he concluded would "occur less often in the large circuit because the larger number of decisions increases the odds that there will be a precedent on point."¹⁵

Hellman's conclusion resonates powerfully with experience and common sense. The bitter truth, known to all who do any legal research, is that there is not too much law, but rather too little. A glance at standard treatises or casebooks in several areas reveals that many issues lack any precedent at all, and that most of the decisional law comes from the district courts.

A variation on the unstable law argument asserts that increasing the number of circuit judges would create instability in the law of the circuit and that this instability in turn would increase the rate of appeal. Proponents of this argument cite the five-fold increase in national appeal rates that has accompanied the steady growth in appellate judgeships.

This argument is a classic example of a logical fallacy, *post hoc ergo propter hoc*. During the last forty years, circuit judgeships have increased, but other changes in the federal appellate courts have also occurred. In that same period, for instance, the average height of circuit judges (adjusted for gender) has increased. Absent some clear causal mechanism, it makes no more sense to attribute accelerated appeal rates to additional judgeships than to increased judicial altitude. Not every correlation is a cause.

More enlightening is a comparison of current appeal rates in circuits of various sizes. If the more-judges-creates-more-appeals argument is valid, we should expect to see a relationship between circuit size and appeal rates. In fact, however, rates of appeal seem to be unrelated to circuit

12. *Id.* at 976.

13. *Id.* at 983.

14. *Id.* at 983-84.

15. *Id.* at 984 (emphasis added).

size, suggesting that increasing the size of the circuit bench is unlikely to affect those rates.

In lieu of enlarging the existing circuits, Congress could create more appellate capacity by creating new circuits. Opponents of this solution see it merely as a trade of one kind of inconsistency for another, contending that inter-circuit conflicts will multiply far beyond the Supreme Court's already inadequate capacity to resolve them.

Once again, the empirical evidence suggests otherwise. In a study commissioned by the Federal Judicial Center pursuant to congressional request, Professor Hellman investigated 142 inter-circuit conflicts that the Supreme Court refused to hear in the 1984 and 1985 Terms.¹⁶ Of these, he found only forty that (a) had not been put to rest by subsequent decisions or legislation, (b) continued to generate litigation, and (c) controlled outcomes in reported cases.¹⁷ Further, he noted that the Court has ample room on its docket to resolve these conflicts.¹⁸ The study shows not only that unresolved inter-circuit conflict is not a serious problem, but also that the creation of several more circuits is not likely to make it one.

b. Consistency v. capacity

Even if we assume that new judgeships will produce significant inconsistency, it still does not follow that Congress should refuse to create them. The logical leap from new-judgeships-increase-inconsistency to create-no-new-judgeships is vulnerable to a powerful *reductio ad absurdum* attack. If consistency is the paramount goal of the judicial process, and fewer judgeships mean more consistency, Congress should *reduce* the number of authorized judgeships. Yet the consequences of such a maneuver would be disastrous. Today the circuit courts can keep current by giving full appellate process to only half their caseload and handle the other fifty percent bureaucratically. If Congress reduced the number of judgeships, even fewer cases would receive the traditional appellate process, and correspondingly more would be handled bureaucratically. To push the absurdity even further, if fewer judgeships mean greater consistency, why not have a single three-judge panel for the nation?

The answer, of course, is that consistency is not the only goal. At least as important is adequate capacity. Thus, even if we assume (counterfactually) that expansion generates inconsistency, we have proved

16. ARTHUR D. HELLMAN, FEDERAL JUDICIAL CENTER UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM iii (1994).

17. *Id.* at 120.

18. *Id.* at 121.

only that adequate capacity on the one hand and legal consistency on the other are competing values that must be balanced against each other, not that judgeships should be frozen at current levels.

In order to strike the proper balance, we would need to know much more than we now know (or even presume to know) about the relationship between additional judgeships and legal inconsistency. In the absence of data on the purported correlation, the issue turns on the burden of proof. That burden belongs on the opponents of expansion because of the difference between known versus unknown costs and benefits. The known benefit is the traditional appellate process which made the federal appellate courts great, and which could still survive if judgeships increased by adequate levels. We ought not give up the chance to retain it without a very good reason. Avoiding losses in certainty and consistency might qualify as a good reason if we could be sure they would occur and we could know their orders of magnitude. It makes no sense, however, to suffer the known evil of increased bureaucratization in return for a completely speculative dividend of increased consistency.

c. Mechanisms that enhance consistency

Even if we assume counterfactually that increased capacity leads inevitably to inconsistency and that consistency is the system's paramount goal, it still does not follow that Congress should refuse to supply additional judgeships. There are numerous devices to safeguard consistency without permanently limiting the nation's appellate capacity. Among them are:

1. Better legislation: Congressional attention, both before and after passage, to statutory issues that recurrently generate litigation (e.g., preemption, retroactivity, limitations).
2. Subject matter specialized appellate courts or panels: These can reduce inconsistency by decreasing the number of decision-makers in a particular area of law.
3. A fourth tier of courts: Another tier of courts between the circuit courts and the Supreme Court could resolve inter-circuit inconsistencies, thus permitting more circuits and allowing each one to remain small enough to minimize intra-circuit inconsistency.

In order to use specialization or a four-tier pyramid to combat the inconsistency that supposedly results from increased appellate capacity, the court would need to abandon several cherished traditions such as the

small size and elite status of the federal judiciary, the historical role of federal judges as generalists, the practice of allowing conflicts to "percolate" before they reach the Supreme Court, and the traditional conventions of circuit alignment. As comforting and familiar as these traditions are, however, they are also peripheral. Historically, the defining characteristic of the federal appellate courts has been that the judges did their own high-quality work and the courts did not ration justice according to the status of the litigants. That defining characteristic, of course, is in serious jeopardy. If the cost of saving it is the abandonment of some peripheral traditions, the price may be high, but it is certainly a worthwhile exchange.

Further, the loss of the peripheral traditions is inevitable anyway. As caseloads continue to rise, the system will seek to accommodate by increasing the use of screening and triage, but there are political limits to that solution. At some point Congress, the bench, the bar, and the public will cease to tolerate a regime that screens sixty or seventy-five or ninety percent of the cases out of the traditional appellate process. The only alternative then will be to increase the number of judgeships. But if the growth and inconsistency hypothesis is correct, the law within and among the circuits will become incoherent, and structural change—specialization of a fourth tier—will be required anyway. In the end, both the peripheral and the central traditions of the federal appellate system will be lost.

4. Loss of Collegiality

Adding judges, it is sometime argued, would reduce collegiality, thereby impairing judicial quality. Little detail accompanies this objection, and for good reason. First, it is by no means clear that collegiality is a function of small size, as famous feuds on the Supreme Court attest. Second, collegiality on the modern circuit court is probably a myth anyway. One study of the Eighth Circuit, a relatively small court, for example, found that even among judges on a particular panel, "the memorandum was the most frequently used means of communication."¹⁹ Communication with off-panel judges was "not extensive," and communication involving track-two cases was nearly nonexistent.

Even if collegiality were not a myth, it is difficult to see why it should be valued so highly. Perhaps collegiality breeds efficiency, but it also entails a cost. Judges who know and like each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other. Of course, collegiality does provide one clear benefit: pro-

19. Stephen L. Wasby, *Internal Communication in the Eighth Circuit Court of Appeals*, 58 WASH. U. L.Q. 583, 589 (1980).

fessional life on a collegial court is more pleasant for the judges. The courts, however, exist for the good of the nation, not the professional satisfaction of the judges.

5. Jurisdictional Retrenchment

Advocates of a small, elite federal judiciary have their own solution to the problem of appellate overload—jurisdictional contraction. According to them, if Congress would just return federal jurisdiction to the proper, limited scope prescribed by the Constitution, history, and federalism, the caseload of the federal courts would decrease enormously, and there would be no need for significant expansion of the judiciary.

The jurisdictional retrenchment argument, however, like the rest of the court-capping rhetoric, is seriously flawed. The argument relies mainly on tradition, but the historical record is anything but clear. The reach of federal jurisdiction has changed repeatedly in response to evolving congressional appraisals of the need for federal solutions to social, political, and economic problems. In the end, the scope of federal jurisdiction has hinged less on theory and tradition and more on politics and expedience.

The thrust of the jurisdictional retrenchment argument is that large expansions of the appellate judiciary will be unnecessary if Congress exercises proper jurisdictional restraint. Thus, the real issue is not whether jurisdictional retrenchment is a good idea, but whether Congress will do it. The prospects are bleak, to say the least. Even the most conservative reform proposals like those of the Federal Courts Study Committee have a knack for prompting spirited opposition, and as a result, few have even been introduced in Congress, let alone adopted.

The more global admonition to Congress against continued federalization of the civil and criminal law is a pipedream. Congress "federalizes" the law in response to powerful political forces, and the vision of an elite federal judiciary, unsullied by cases based on improperly federalized crimes and civil claims, has no constituency large, numerous, or powerful enough to oppose groups that favor particular federalizing legislation.

The jurisdictional retrenchment argument is not only bad politics, it is bad policy as well. Its fundamental error is to misconceive the function of federal jurisdiction. The jurisdiction exists for the good of the country—not for the good of the federal courts. If Congress believes that "federalizing" some area of the law will benefit the country by controlling the drug problem or by protecting battered women, it is not merely Congress's right, but its *duty* to pass such legislation, even though it might discomfort the federal judges or require additional judgeships.

The size of the task should control the size of the tool, not vice versa. The jurisdictional retrenchment argument, however, reverses this crucial priority. The argument starts with the premise of a small, elite federal judiciary and then reasons that, because of its size, the courts should have only a minimal core of federal jurisdiction. But surely Congress's job is to approach the problem from the front end, first determining how much federal legislation and federal jurisdiction the nation needs and then supplying the federal courts with judgeships and other resources equal to the task.

IV. ELITISM

If judicial opposition to expansion cannot rest credibly upon the arguments usually advanced, are there other considerations that may help to explain it? One motive is familiarity. The current generation of judges has worked with the bureaucratic model of justice for their entire judicial careers, and there is a natural tendency to "view as appropriate that which is familiar."²⁰ Practice on the new certiorari courts also permits the judges to replicate their roles in practice, where they functioned more as team leaders than as isolated artisans. The role of the modern appellate judge, supervising elbow clerks, central staff, and legal externs comfortably echoes the role of the senior practitioner, supervising the work of junior partners, associates, and paralegals.

Another motive is probably quality of life. Judge Tjoflat writes that "life as a judge on a jumbo court is comparable to life as a citizen in a big city—life on a smaller court to life in a small town."²¹ Thus, "judges in small circuits are able to interact with their colleagues in a more expedient and efficient manner than judges on jumbo courts."²² Although this image is attractive, reality is somewhat different, as the earlier discussion of collegiality shows. The small town metaphor is also disturbing. It suggests that judges associate a "small town" existence with comfort, and that sitting on a larger court would be less homey. But the comfort of the judges is easily overvalued; again, the courts exist for the good of the nation, not for the satisfaction of the judges.

Yet another reason for judicial reluctance to expansion is concern about status. As then-Professor Frankfurter wrote long ago: "A powerful judiciary implies a relatively small number of judges."²³ Others are even

20. Lauren K. Robel, *Caseload and Judging: Judicial Adaptions to Caseload*, 3, 55 *BYU L. REV.* (1990).

21. Gerald B. Tjoflat, *More Judges, Less Justice*, 79 *A.B.A. J.* 70, 70 (July 1993)

22. *Id.*

23. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *CORNELL L.Q.* 499, 515 (1928).

more explicit about the relation among size, status, and power. Justice Scalia does not want a larger judiciary: "[I]t only dilutes the prestige of the office and 'aggravates the problem of image.'"²⁴ Fortunately, at least some judges believe that concerns about comfort and status should not control the way the circuit courts decide cases or motivate the judiciary's advocacy for restricting its own size. Judge Reinhardt is brutal in his candor:

We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender this wholly unrealistic and outdated vision of the federal judiciary, many of us are willing to ration justice, to eliminate some of the best qualities we once associated with appellate decisionmaking, and to shut the doors of the courts to the American people by severely restricting our jurisdiction.²⁵

CONCLUSION

Congress established the United States Courts of Appeals to correct error at the district court level, and for the first eighty years of their existence, the circuit courts performed that function as a common law appellate court should—visibly, collegially, personally, accountably, and equitably. In nearly all cases—"important" and "trivial"—they heard oral argument, conducted face-to-face conferences, personally wrote reasoned opinions, and published those opinions, standing by their precedential effect.

Beginning around 1970, the courts began to truncate the traditional model to keep pace with an overwhelming increase in the volume of cases. Today, many cases get no argument, no conference, and no written, published precedential opinion. Further, instead of the personal attention of Article III judges, they receive bureaucratic treatment at the hands of the central staff. Finally, the bifurcation often occurs along class lines, wealthy, powerful, and institutional litigants receiving the lion's share of the courts' limited resources.

The obvious solution to the problem is to create enough judgeships to treat all cases in the traditional mode, but the Judicial Establishment has opposed that solution vigorously, relying on an array of exceedingly

24. Stuart Taylor Jr., *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, at 1, 12.

25. Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1513 (1995).

weak arguments. Thus, there is no empirical support for the fear that expansion will reduce the quality of the bench. The cost of new judgeships is not overwhelming compared to other federal expenditures; and if it were, that would excuse only Congress's failure to supply the positions, not the judiciary's refusal to ask for them. According to the only available empirical studies, expansion will not create legal instability; and even if it did, adequate capacity is at least as important as consistency. The jurisdictional retrenchment argument is fantasy. Congress is not about to make radical cuts in federal jurisdiction to accommodate the judiciary's desire to remain small, nor should it; the size of the job should dictate the size of the tool, not vice versa.

The superficiality of these anti-expansion arguments suggests, and some judges candidly admit, that the desire to maintain collegiality and prestige is a major reason for judicial opposition to expansion. There is nothing intrinsically wrong with those goals; but shortchanging the litigants for the benefit of the judges *is* wrong. The courts exist for the good of the nation, not the judges.